IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

Ronald A. Brandon	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:09-cv-152
	)	**District Judge Varlan**
Financial Accounts Services Team,	)	**Magistrate Judge Guyton**
Inc., Financial Accounts Services	)	
Team, and Phillip S. Knight,	)	Jury Trial Demanded
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT FINANCIAL ACCOUNTS SERVICES TEAM, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

INTRODUCTION

Plaintiff Ronald A. Brandon ("Plaintiff") filed his original complaint for relief on April 10, 2009, under the Fair Debt Collection Practices Act ("FDCPA") against Defendant Financial Accounts Services Team, Inc. ("Defendant FAST"). Plaintiff filed an amended complaint on May 20, 2009 against all Defendants. Defendant FAST filed a motion to dismiss the action for lack of subject matter jurisdiction because the Plaintiff's claims were time-barred by the FDCPA's one-year statute of limitation (the “Motion”) and Memorandum in support thereof (“Defendant’s Memorandum”). The Plaintiff files this Memorandum of Law (“Plaintiff’s Memorandum”) in opposition to Defendant FAST's Motion and for each of the reasons stated herein, respectfully requests this Court to enter an order denying Defendant FAST's Motion in its entirety, and order that the causes of action against all Defendants proceed to discovery, and a full and complete trial on the merits.

STATEMENT OF FACTS

The debt that Defendants are attempting to collect went into default in approximately October 1998. The debt was allegedly sold to Maui Collection Service, Inc. (hereinafter “Maui Collection”) in approximately 2002. The debt was consigned, placed or otherwise transferred to Defendants for collection from Plaintiff, in approximately November 2002. The time period for reporting the debt as delinquent on Plaintiff’s credit report expired no later than December 31, 2006. See 15 U.S.C. § 1681c(c)(1). Plaintiff’s First Amended Complaint (“Amd. Compl.”) ¶¶ 8-11.

In approximately January 2008, Plaintiff obtained a copy of his credit report from Equifax which showed that Defendants were reporting to Equifax that the date of first delinquency for the debt was September 2002. On or about February

1, 2008, Plaintiff sent a letter by certified mail to Equifax and Defendants that disputed the correct date of first delinquency was November 2002 and requested the removal of incorrect information on Plaintiff's Equifax credit report, specifically, the date of first delinquency as November 2002 and the statement that this information would remain on Plaintiff's credit report until January 2009. Plaintiff included with his letter to Defendants a copy of a July 7, 2000 statement from Maui Collection which showed the debt was delinquent at that time. On or about February 19, 2008 Plaintiff received written notification from Equifax that the incorrect date of first delinquency on the debt of September 2002 had been verified by Defendants as correct. Plaintiff never received any response to his request from Defendants. Amd. Compl. ¶¶ 12-16.

On or about April 25, 2008, Plaintiff obtained a copy of his Experian credit report dated April 25, 2008 which showed that Defendants were communicating credit information which was false. A copy of the pertinent page of Plaintiff's April 25, 2008 Experian Credit Report is filed as Exhibit 1 to Plaintiff's Memorandum.

On or about April 29, 2008, Plaintiff sent a letter to Defendants by certified mail regarding his February 1, 2008 dispute and request regarding the incorrect information being reported by Defendants to Equifax. With this letter, Plaintiff enclosed copies of documents that supported his claim that the information being reported by Defendants to Equifax was incorrect and again asked that the incorrect information be removed from Plaintiff's Equifax credit file. Defendants never responded to Plaintiff's second request to remove the incorrect information. Amd. Compl. ¶¶ 17-19. A redacted copy of this correspondence is filed as Collective Exhibit 2 to Plaintiff's Memorandum.

On or about the following dates: May 15, 2008, November 13, 2008, and December 28, 2008, Plaintiff obtained a copy of his Equifax credit report which showed that Defendants were still reporting the debt to Equifax. Amd. Comp. ¶¶ 20, 26, 29.

ISSUED PRESENTED

In its Memorandum in support of its Motion to Dismiss for lack of subject matter jurisdiction, Defendant FAST readily admits that "[o]ut of an abundance of caution and in response to [Plaintiff's April 29, 2008] letter (See Amd. Comp. ¶¶ 17-19), Defendant FAST once again requested that the debtor's information be removed from all three credit bureaus to which it reports information." Defendant's Memorandum, p.6, 2nd full paragraph. This information is also confirmed in the affidavit of Bobby Eugene Key, Jr., identified as the Collection Manager of Defendant FAST where he testifies to this fact and that "[t]he request for removal was sent on May 9, 2009 [sic]. Exhibit A to Defendant's Memorandum, p.2, ¶ 6. Further the Exhibit to Exhibit A to Defendant's Memorandum ("Account Audit Note"), p.7, last entry dated May 9, 2008, confirms Mr. Key's testimony.

In spite of its actions that were taken during the limitations period, Defendant argues that the Court should disregard claims for violations prior to the limitations period, which it identifies as prior to April 10, 2008, but also dismiss claims arising during the limitations period.

The issue presented is whether claims for actions that occur during the limitations period may be dismissed as time-barred based on prior violations of the same or similar nature?

1. The Plain language of the Statute does not support the construction urged by Defendant.

The FDCPA contains an express limitations period which is found in 15 U.S.C. § 1692k.

The act provides that claims may be brought within one year of the date of the alleged violations:

> An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to

> the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

15 U.S.C. § 1692k(d). Under the express language of this section, the relevant date for the accrual of an action is the date of the violation. There is no mention or intimation that repeated violations of the FDCPA which are identical to prior violations can or would effect the limitations period or the time for the accrual of the claim.

Defendant argues that because it had violated the statute prior to the limitations period using automated equipment, it acquires some sort of license or right to violate the statute without recourse. Based upon Defendant's argument, Defendant could setup an autodialer system which called Plaintiff, and delivered abuse, profane and harassing messages without any recourse, so long as it could prove that it had violated the statute in the same way before the limitations period.

More importantly, by Defendant FAST's argument, it could resume reporting of this account on Plaintiff's consumer report tomorrow and report indefinitely in the future, without a dispute marker and without any fear of action under the FDCPA.

Put another way, Defendant FAST argues that by not suing upon the first violation — irrespective of whether Plaintiff knew of the violations — Defendant FAST acquired a “get out of jail free” card to continue to violate without penalty. These absurd results are nowhere envisioned in the language or policy of the act. *Murphy v. MRC Receivables Corp.,* 2007 WL 148823 (W.D.Mo. 2007)(letters sent outside limitations period do not immunize communications within the limitations period).

In cases such as these, taking cognizance of such a defense would also provide incentives for defendants to manufacture evidence of prior violations in order to evade liability. Similarly, such a defense appears to run counter to the statute's express purpose by providing a competitive advantage to bad actors that violate consistently by providing a limitations defense not available to those who violate only once. See 15 U.S.C. § 1692. Thus, this argument would have the result of rewarding serial violators who evade detection and penalize single violators who are promptly found out. Simply put, the argument advanced by Defendant is neither grounded in the plain language nor the purpose of the act.

2. To the Extent that the Court is willing to follow Wilhelm, the rule in that case does not require preclusion of Plaintiff's claims.

Defendant FAST cites *Wilhelm v. Credico, Inc.,* 455 F.Supp.2d 1006 (D.N.D. 2006) for the broad proposition that Plaintiff is prohibited from bringing claims based on credit reporting that occurred more than one year after it purportedly stopped violating the act (October 2004 or maybe January 2008, depending on Defendant FAST's different interpretations). This reading does not, however, reflect the holding of *Wilhelm* which is actually much narrower.

Rather, the only holding of *Wilhelm* is that Plaintiff's cause of action accrued at the time he discovered the first appearance of the item on his credit report and disputed it:

> The Court finds that the unpublished Eighth Circuit decisions, as well as the reported decisions of other districts, rejecting the "serial violations" theory to be persuasive. The Courts finds that, as a matter of law, Wilhelm's claims against Pinnacle based on 15 U.S.C. § 1692e(8) accrued shortly after December 10, 2003 - the date Wilhelm first sent a letter to Credico disputing the debt. Wilhelm had until early December 2004 to file a suit against Pinnacle based on the alleged violation(s). There is no question that Wilhelm's suit against Pinnacle is deemed to have been filed on October 3, 2005. Thus, Wilhelm's claims against Pinnacle were clearly filed outside the prescribed statute of limitations, and thus, are untimely.

Thus, the actual holding of *Wilhelm* only requires that the Court apply the limitation if Plaintiff knew of the violation prior to the one-year limitation period. Such a reading is far more consistent with the statute than the position urged by Defendant FAST. Under Defendant FAST's reading, the Plaintiff's cause of action for violation could have commenced and run effectively prohibiting any action by Plaintiff for current or future violations — without the Plaintiff ever realizing that Defendant had violated the statute.

Wilhelm itself — while wrongly decided — does not command this result. In *Wilhelm,* the Plaintiff learned of the adverse credit information more than a year prior to the filing of his suit, thus accruing the statute under the holding there. Thus, the Court need not even entertain the arguments about whether *Wilhelm* was rightly or wrongly decided. Rather, the Court need only find that Defendant enjoys no immunity to engage in prospective violations unless Plaintiff knew of the reporting prior to the limitations period.

In the present case, the facts show that in February 2008 Plaintiff notified Defendant FAST by certified mail with proof of receipt signed by Defendant Phillip S. Knight (hereinafter "Defendant Knight") (See Exhibit 2 to Plaintiff's Memorandum, p. 9) that he disputed the information about the debt that Defendant FAST was reporting to the credit reporting agencies and asked Defendant FAST to correct it. Defendant FAST did not respond to Plaintiff's request in January 2008. Plaintiff did not discover until April 25, 2008 when he obtained his Equifax credit report that Defendant FAST had failed to communicate to Equifax that the Plaintiff had disputed the debt.

The reporting of this debt to Equifax by Defendants was a "communication" in an attempt to collect a debt as that term is defined by 15 U.S.C. § 1692a(2). *See Riveria v. Bank One*, 145 F.R.D. 614 (D. P.R. 1993); *accord Blanks v. Ford Motor Credit*, 2005 WL 43981, at *3 (N.D. Tex. Jan. 7, 2005) (communicating information to credit reporting agency is a communication in connection with the collection of a debt); *Akalwadi v. Risk Mgmt. Alternatives, Inc.*, 336 F. Supp. 2d 492, 503 n.4 (D. Md. 2004) (reporting debt is "in connection with" debt collection); *Sullivan v. Equifax*, 2002 WL 799856, 2002 U.S. Dist. LEXIS 7884, at *15, (E.D. Pa. April 19, 2002) (reporting a debt is a powerful collection tool); *Ditty v. Checkrite, Ltd.*, 973 F. Supp. 1320, 1331 (D. Utah 1997) (reporting bad check information to others is designed to give collector additional leverage over debtor); *In re Sommersdorf*, 139 B.R. 700, 701 (Bankr. S.D. Ohio 1991).

The FDCPA, 15 U.S.C. 1692a, states that:

> The term “communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium.

Each communication of the false information after Plaintiff had sent Defendant FAST two letters by certified mail to dispute the information and ask that it be corrected were communications by Defendants to Equifax and to any other party who accessed Plaintiff’s credit report within the year prior to the filing of his Complaint was (a) the use of a false, deceptive and misleading representation or means in connection with the collection of the debt, (b) the false representation of the legal status of the debt, (c) the communicating of credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed, (d) the use of a false representation or deceptive means to collect or attempt to collect the debt, and (e) the use of an unfair means to collect or attempt to collect the debt, in violation of 15 U.S.C. § 1692e, 1692e(2)(A), 1692e(8), 1692e(10), and 1692f, amongst others.

Thus, the facts of this case are not on all fours with Wilhelm since there is no record evidence that Plaintiff knew of the violations prior to the limitations period. *See Kirscher v. Messerli & Kramer, P.A.*, 2006 WL 145162 (D.Minn. 2006) (violation accrues when the debtor receives notice of the misrepresentations). Each of the other citations relied upon by Defendant FAST hold the same; that the limitations period does not commence until Plaintiff knows of the misrepresentations. Plaintiff could not have known of the communications by Defendant FAST to Equifax and any other party that accessed his credit report within the year prior to filing his Complaint until he actually obtained the individual credit reports and became aware of each new violation.

Accordingly, the Court should deny Defendant FAST's request to dismiss Plaintiff’s FDCPA claims which were timely filed.

3. Case law, does not support the rule proposed by Defendant.

Finally, Defendant FAST argues that *Wilhelm v. Credico, Inc.*, 455 F.Supp.2d 1006 (D.N.D. 2006) as well as the authority cited therein require the Court to hold that alleged violations committed within the limitations period are time-barred as a result of Defendant's prior violations of the FDCPA. Of those cases cited, only *Wilhelm* appears to speak directly to the argument advanced by Defendant FAST, namely, whether prior violation allows Defendant FAST a “get out of jail free” card to continue to violate the act. While the *Wilhelm* case may stand for this proposition, its internal citations do not bear out this proposition. And to the extent that they do, they do not stand on sound analysis. As such, the underpinnings of *Wilhelm* do not soundly support the proposition for which they are cited, and the case should be disregarded. Moreover, *Wilhelm's* holding has been rejected as unsound based on similar reasoning. *Murphy v. MRC Receivables Corp.*, 2007 WL 148823 (W.D. MO. 2007).

Wilhelm relied principally on two Eight Circuit Cases for its holding: *Kirscher v. Messerli & Kramer P.A.*, 2006 WL 145162 (D.Minn. 2006) and *Fraenkel v. Messerli & Kramer, P.A.*, 2004 WL 1765309 (D.Minn 2004). In *Kirscher*, the Plaintiff attempted to use the debt collector's continued reliance on prior violations to revive claims that had expired. Thus, in that case, it was the Plaintiff seeking to use an alleged violation made during the limitations period to revive time-barred claims of the same nature. Plaintiff there attempted to use the "continuing violation" theory as a sword to assert liability. More importantly, the Court recognized that actions which were alleged to have occurred within the limitations period would have been properly before the Court:

> This is not a case where defendants have sent a series of threatening letters, each of which violate the FDCPA and only some of which are time-barred. Here, Sierra's assertion of a violation is the "unfair and illegal" attorneys' fees authorized by the June 5, 1997 agreement, which Sierra breached when he ceased making payments. This suit, filed on November 13, 1998 is therefore time-barred.

Kirscher, supra at *4. Thus, the Court recognized that violations within the limitations period would have been actionable and prior violations would not have affected their viability and does not expressly stand for the proposition argued for by Defendant FAST.

Another case in which Plaintiff attempted to use an alleged violation made during the limitations period to revive time-barred claims of the same nature was *Hunter v. Washington Mutual Bank, et al.,* No. 2:08-CV-069, 2008 WL 4206604 (E.D. Tenn. September 10, 2008). Judge Jordan held in *Hunter* that:

> "Plaintiff is incorrect. Courts analyze the timeliness of serial FDCPA claims individually in terms of when each violation occurred. *See., e.g., Drumright v. Collection Recovery, Inc.*, 500 F.Supp. 1, 1-2 (M.D. Tenn. 1980). Alleged violations occurring outside the limitations period are dismissed, and jurisdiction is retained over the violations alleged to have occurred within one year of filing suit. *See, e.g., id.; Purnell v. Arrow Financial Fin. Servs. LLC,* No. 05-CV-73384-DT, 2007 WL 421828, at *4 (E.D. Mich. Feb. 2, 2007); *Gunter v. Columbus Check Cashiers, Inc. (In re Gunter),* 334 B.R. 900, 906 (Bankr. S.D. Ohio 2005). The present motions will be granted as to count two, but only to the extent that plaintiff alleges FDCPA

violations occurring more than one year prior to filing suit.

The Court in *Purnell* rejected *Wilhelm* holding that "caselaw that states an FDCPA claim accrues at some point other than, as Section 1692k(d) requires, 'the date on which the violation occurs.' Specifically, the court will not follow the holding of *Wilhelm*, which held that the claims accrued shortly after the consumer's first letter disputing the debt. 455 F. Supp.2d at 1009. Because Section 1692k(d) is silent about the conduct of the consumer, the date of dispute is irrelevant. Again, the relevant consideration is the date of the alleged violation by the debt collector. In this case, several violations occurred well within the period of limitations in the form of communications that failed 'to communicate that a disputed debt is disputed.' 15 U.S.C. § 1692e(8).

Similarly, in *Sierra* v. *Foster & Garbus,* 48 F.Supp.2d 393 (S.D.N.Y. 1998), Plaintiff made no specific allegations of miscommunications within the one-year limitations period. Rather, Plaintiff tried to bootstrap the limitations period by claiming that the communication which occurred outside the one year period effectively continued in force because those communications were made in a collection complaint against the consumer and the action remained pending in court. The Court dismissed, simply holding that no communications were alleged to have occurred within the one-year limitation period. "I agree. This is not a case where defendants have sent a series of threatening letters, each of which violate the FDCPA and only some of which are time-barred." *Id.* The posture of *Calka v. Kucker, Kraus & Bruh, LLP,* 1998 WL 437151 (S.D.N.Y.,1998) was similar in that the Court did not have before it any specific instance of communications within the limitations period, rather only the general maintenance of a suit predicated upon misrepresentations made to the court prior to the limitations period.

In sum, the only case where the Court dismissed claims predicated upon misrepresentations alleged to have occurred in the limitations period were *Fraenkel* and *Wilhelm.* And each of those cases accepted without analysis the notion that "new communications ... concerning an old claim ... do not start a new period of limitation" as found in *Campos v. Brooksbank,* 120 F.Supp.2d 1271 (D.N.M.2000). By relying on this overgeneralized holding, each of those cases overlooks that *Campos v. Brooksbank,* actually sustained the consumer's right to sue on the new communications that were within the limitations period.

As such, each court that has engaged in any analysis of facts and law as simply applied the general rule of limitations, namely that violations alleged to have occurred within the limitations period are actionable, and those that fall outside are not. This leads to the unremarkable conclusion that new violations do not revive expired claims, and time-barred violations do not invalidate timely

claims. See, *e.g., Pittman v. J.J. Mac Intyre Co. of Nevada, Inc.,* 969 F.Supp. 609 (D.Nev.1997); *Sierra v. Foster & Garbus,* 48 F.Supp.2d 393 (S.D.N.Y.1998); *Murphy v. MRC Receivables Corp.,* 2007 WL 148823 (W.D.Mo.2007); *Calka v. Kucker, Kraus & Bruh, LLP,* 1998 WL 437151 (S.D.N.Y.1998); *Campos v. Brooksbank,* 120 F.Supp.2d 1271 (D.N.M.2000).

CONCLUSION

For each of the reasons stated herein, Plaintiff respectfully requests this Court to deny Defendant FAST's motion to dismiss and enter an order allowing the Plaintiff's complaint for relief against Defendants to proceed to discovery and to a full and complete trial on the merits, and for whatever additional relief the Court deems just and proper at this time.

07/21/09

Respectfully submitted,

RONALD A. BRANDON

/s/ Alan C. Lee

Alan C. Lee, Esq.
Attorney for Plaintiff
PO Box 1357
Morristown, TN 37816-1357
Telephone: (423) 586-4300
alan@thepopefirm.com

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2009, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent by operation of the Court's electronic case filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic case filing system.

/s/ Alan C. Lee
Alan C. Lee, Esq.
Attorney for Plaintiff